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SENATE

REPORT
No. 94–1035

FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1976

JULY 15, 1976.—Ordered to be printed
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Mr. KENNEDY, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 3197]

The Committee on the Judiciary, to which was referred the bill (S. 3197) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

AMENDMENTS

On page 2, line 16, strike out "assists" and insert after the second "or", the word "knowingly".

On page 2, line 16, strike out "and" and insert in lieu thereof "or".

On page 2, line 20, insert the word "surveillance", after the word "other".

On page 3, line 2, insert the word "surveillance" after the word "other".

On page 3, line 3, strike out "transmission", and insert in lieu thereof "communication".

On page 3, lines 4 and 5, strike out "with a reasonable expectation of privacy", and insert in lieu thereof "under circumstances where a person has a constitutionally protected right of privacy and".

On page 3, line 5, strike out "point of origin", and insert in lieu thereof "sender".

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Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Church (hereafter referred to as the Church committee), has concluded that every President since Franklin D. Roosevelt asserted the authority to authorize warrantless electronic surveillance and exercised that authority. While the number of illegal or improper national security taps and bugs conducted during the Nixon administration may have exceeded those in previous administrations, the surveillances were regrettably by no means atypical. In summarizing its conclusion that surveillance investigation was "often conducted by illegal or improper means," the Church committee wrote:

> Since the 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant. . . . [P]ast subjects of these surveillances have included a United States Congressman, a Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group. (vol. 2, p. 12.)
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> The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment Rights of both the targets and those with whom the targets communicated. The inherently intrusive nature of electronic surveillance, moreover, has enabled the Government to generate vast amounts of information—unrelated to any legitimate government interest—about the personal and political lives of American citizens. The collection of this type of information has, in turn, raised the danger of its use for partisan political and other improper ends by senior administration officials. (vol. 3, p. 32.)

Also formidable—although incalculable—is the "chilling effect" which warrantless electronic surveillance may have on the constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights prevents not only direct infringements on constitutional rights; it also prevents government activities which effectively chill the exercise of these rights. The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

S. 3197 is designed, therefore, to curb the practice by which the executive branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it.

At the same time, however, this legislation does *not* prohibit the use of electronic surveillance to obtain foreign intelligence information. As the Church committee pointed out:

> Electronic surveillance techniques have understandably enabled these agencies to obtain valuable information relevant to their legitimate intelligence missions. Use of these techniques has provided the Government with vital intelligence, which would be difficult to acquire through other means, about the activities and intentions of foreign powers and has provided important leads in counter espionage cases. (vol. 2, p. 274.)

Safeguarding national security against the intelligence activities of foreign agents remains a vitally important Government purpose. Few would dispute the fact that we live in a dangerous world in which hostile intelligence activities in this country are still carried on to our detriment.

Striking this balance between the need for such surveillance and the protection of civil liberties lies at the heart of S. 3197. As Senator Kennedy stated in introducing the legislation:

> The complexity of the problem must not be underestimated. Electronic surveillance can be a useful tool for the Government's gathering of certain kinds of information; yet, if abused, it can also constitute a particularly indiscriminate and penetrating invasion of the privacy of our citizens. Our objective has been to reach some kind of balance that will protect the security of the United States without infringing on our citizens' human liberties and rights.[4]

The committee believes that the executive branch of Government should have, under proper circumstances, authority to acquire important foreign intelligence information by means of electronic surveillance. The committee also believes that the past record establishes clearly that the executive branch cannot be the sole or final arbiter of when such proper circumstances exist. S. 3197 is designed to permit the Government to gather foreign intelligence information by means of electronic surveillance but under substantive limitations and according to procedural guidelines which will better safeguard the rights of individuals and prevent the reoccurrence of abuses which have occurred.

III. BACKGROUND

Bipartisan congressional support for S. 3197 and the constructive cooperation of the executive branch toward the legislation cannot mask the fact that substantial differences continue to exist among members of the Congress and the executive branch concerning the constitutionality of warrantless wiretapping. This is not surprising since the United States Supreme Court has never expressly decided the issue of whether the President has constitutional authority to authorize warrantless electronic surveillance in cases concerning the national security. Whether or not the President has a so-called "inherent power" to engage in or authorize warrantless electronic sur-

[4] 122 Cong. Rec. S4025 (daily ed., Mar. 23, 1976).

S. 3197 is based on the premise (supported by history) that executive self-restraint, in the area of national security electronic surveillance, is neither feasible nor wise. The determination of when "national security" is in jeopardy is necessarily subjective. This determination can lead to electronic surveillance of those perceived as a threat when, in fact, no such threat exists. S. 3197 is designed to provide both external and internal checks on such subjective determinations.

But establishing statutory limits in the area of foreign intelligence electronic surveillance has proven a difficult task. Perhaps the most difficult issue posed during committee deliberations was whether such surveillance should be limited to situations involving the commission of a crime.

The committee has made a limited exception in this bill for electronic surveillance when an American acting under the control of a foreign power engages in certain clandestine intelligence gathering which is not presently a violation of federal criminal statutes.

Although there are precedents for departing from a strict criminal standard in the issuance of search warrants deemed compatible with the fourth amendment, see e.g., *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973); cf. *United States* v. *Martinez-Fuerte*, —— U.S. —— (1976) (No. 74–1560, decided July 6, 1976) (no warrant required), those decisions did not involve national security intelligence, with its recognized potential for abuse. It should also be noted, however, that in the *Keith* case, *supra*, the Supreme Court noted that the reasons for domestic security surveillance may differ from those justifying surveillance for ordinary crimes and that, accordingly, "Different standards may be compatible with the fourth amendment if they are reasonable both in relation to the legitimate needs of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizens rights deserving protection." (407 U.S. at 322.) (See also, *Zweibon* v. *Mitchell*, *supra*, at 669.) As indicated in the section-by-section analysis, this departure from the general principle that such surveillance must be linked to criminal activity is intended to be a narrow, circumscribed one, reflecting the deep concern of the committee. This bill authorizes electronic surveillance in a limited number of noncriminal situations only under the twin safeguards of an independent review by a neutral judge and his application of the "probable cause standard."

It is important to note that the committee's favorable recommendation of this legislation in no way reflects any judgment that it would also be appropriate to depart from the standard of criminal activity as the basis for using other intrusive investigative techniques. The bill does not impliedly authorize departure from the standard of criminality in other aspects of national security investigations or intelligence collection directed at Americans without the safeguards of judicial review and probable cause. It remains to determine, in fashioning a charter for the use of informants, physical surveillance and other investigative procedures, whether the departure from a criminal standard is an acceptable basis for investigating Americans on grounds of national security.

Section-by-Section Analysis

Section 1 of the bill provides that the Act may be cited as the "Foreign Intelligence Surveillance Act of 1976".

Section 2 of the bill amends the Omnibus Crime Control and Safe Streets Act of 1968 (Pub. L. 90–351, Title III, section 802) by adding a new chapter 120 and items 2521–2528:

Section 2521

Subsection (a) provides that except for those terms specifically defined in this section the definitions of Chapter 119, relating to the interception of wire and oral communications, apply to this chapter as well.

Subsection (b)(1) defines an "agent of a foreign power" in two separate ways. Subparagraph (i) includes officers and employees of foreign powers who are not United States citizens or aliens lawfully admitted for permanent residence. The definition is framed in this way because it is presumed that nonresident aliens who are indeed officers or employees of a foreign power are likely sources of foreign intelligence information. Given a foreign officer or employee's tenuous relationship with the United States and their close relationship with a foreign power, this standard is considered by the committee to be reasonable in light of the Government's legitimate need for foreign intelligence information and the nature of the interests upon which the search would intrude. Employees of a foreign power are meant to include those persons who have a normal employee-employer relationship.[20]

Subparagraph (ii) offers a second definition of "agent of a foreign power," which encompasses two different types of persons. The first is a person who, pursuant to the direction of a foreign power, is engaged in clandestine intelligence activities, sabotage, or terrorist activities. The second is a person who conspires with or knowingly aids or abets another person who is acting pursuant to the direction of a foreign power and is engaged in such activities.

It should be noted at the outset that the definition of "agent of a foreign power" would only include American citizens and aliens lawfully admitted for permanent residence who are engaged in clandestine intelligence activities, sabotage, or terrorist activities pursuant to the direction of a foreign power or who consciously conspire with or knowingly aid or abet persons who engage in these activities.

Thus the two constituent elements of the definition of such an agent are his relationship with a foreign power or an agent of a foreign power and, secondly, the nature of the activities in which he enages.

A. "Pursuant to the Direction of a Foreign Power"

"Pursuant to the direction" of a foreign power means that a person must be acting under the direction and control of such power. There

[20] This bill is not intended, of course, to repeal or abrogate the Vienna Convention on Diplomatic Relations, which was ratified by the Senate and came into effect in the United States on December 13, 1972. This Convention provides that diplomatic agents, their residences (article 30(1)), and their missions (article 22(1) and (3)), as well as their official correspondence (Article 27(2) and 30(2)), are "inviolable." The obligations of the Convention are reciprocal; when another nation has failed to maintain the inviolability of American diplomatic communications, this country is free under international law to act similarly towards representatives of that nation (article 47(2a)).

presidential power pursuant to Congressional authorization. Even Justice Sutherland's opinion in *Curtiss-Wright* conceded that those powers "like every other governmental power . . . *must be exercised in subordination to the applicable provisions of the Constitution.*" (299 U.S. at 320 (emphasis added).)

At most *Curtiss-Wright*, *Waterman* and similar cases merely underline the broad nature of the President's powers to protect the national interest from foreign threats and to conduct foreign relations, including the implied power to gather foreign intelligence. But the existence of such powers does not establish "inherent" authority to exercise them in disregard of the fourth amendment. Those cases do not, as Judge Wright notes: "preordain the procedures with which the President must comply in exercising that authority." (516 F.2d at 616.)

Numerous Supreme Court decisions have acknowledged the President's powers as Commander-in-Chief and his powers in foreign affairs and nevertheless have insisted that his actions pursuant to those powers pass muster under other constitutional provisions. Throughout our history—even in time of war or civil insurrection—the Court has adhered to the principle that the President cannot exercise his power without regard for the Bill of Rights.[19]

The test, then, of the President's alleged "inherent power" is whether warrantless electronic surveillance for foreign intelligence is a "reasonable" fourth amendment search. In balancing the fourth amendment interests threatened by such intelligence gathering against the President's national security responsibilities, we believe that the ultimate question is the same whether the threat to national security be foreign or domestic: Would the procedural safeguards of a prior judicial warrant necessary to effectuate the fourth and first amendment "unduly frustrate the exercise of presidential power." [20]

The potential danger from foreign threats may often be greater than those which are wholly domestic, and the President's preeminence in matters of foreign affairs is unique.[21] But even in the case of foreign intelligence collection, such a balancing test is the only meaningful way to accommodate the exercise of his powers to the first and fourth amendment.

Would a judicial warrant requirement "unduly frustrate" foreign intelligence gathering through electronic surveillance of Americans?

In *Keith*, the Justice Department urged three principal grounds for

[19] *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946) (imposition of military law on Hawaii because of threatened attack); *Ex parte Milligan*, 71 U.S. (4 Wall. 2) (1866) (imposition of material law); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (prior restraint of Pentagon Papers publication); *Mitchell* v. *Harmony*, 54 U.S. 13 How.) 115 (1852) (destruction of property without compensation); *Reid* v. *Covert* 354 U.S. 1 (1957) (military trial of civilian dependents abroad.) The point is not whether the particular action was struck down as in the cases just cited. or upheld, e.g. *Hirabayashi* v. *United States* 320 U.S. 81 (1943) (internment of citizens of Japanese ancestry). In all of the cases, when a civil liberties challenge was made. the particular way in which the President sought to exercise his admitted powers was weighed in the context of the pertinent constitutional restraints.

[20] This was the test used in *Keith* to balance presidential power to protect national security from domestic threats against the first and fourth amendment interests jeopardized by warrantless electronic surveillance:

> "If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of the Government to protect itself from acts of subversion and otherthrow directed against it." (407 U.S. a 297.)

[21] Surely, not all foreign relations are as vital to "national security" as the threat or conduct of a Civil War.

finding such warrants incompatible with the President's responsibilities in the case of domestic threats to national security.

(1) the purpose of surveillance to gather intelligence rather than to gather evidence for specific prosecutions;

(2) inadequate expertise of the judiciary to determine the extent of a threat to national security and the need for the surveillance;

(3) the potential danger of security leaks if the Government had to disclose security information in making application to a court.

The Supreme Court rejected each of these contentions as insufficient, singly or collectively to outweigh the fundamental fourth amendment safeguard of prior review by a neutral magistrate. The Court responded that:

> "Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech." (407 U.S. at 320.)

As for judicial competence, it wisely suggested that:

> "If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probably cause for surveillance." (*Ibid.*)

Finally, the Court emphasized that:

> "The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases. * * * Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Government itself to provide the necessary clerical assistance." (*Ibid.*)

One further argument not squarely addressed by the Supreme Court in *Keith* is the need for swift action in exigent circumstnces which would not permit the delay occasioned by obtaining a court order. But that concern is fully met by the emergency provision in S. 3197 for initiating surveillance without a warrant, subject to subsequent judicial review.

We believe that these same issues—secrecy and emergency, judicial competence and purpose—do not call for any different result in the case of foreign intelligence collection through electronic surveillance.

Although the Department of Justice correctly notes that the holding in *Keith* was limited to domestic security surveillance, it has offered no persuasive arguments why the same analytical framework applied there should not control in evaluating warrantless surveillance for foreign intelligence. It has advanced no reasons why the kind of warrant requirements fashioned in this bill would unduly frustrate the gathering of such intelligence, other than the same contentions dispatched by the Court in *Keith*.

The Church committee examined the history of warrantless electronic surveillance for foreign intelligence purposes and the trail of abuses left in the wake. The committee concluded that even in the case of wiretapping or bugging conducted against Americans by our intel-